IN THE COURT OF APPEALS OF IOWA

No. 3-1045 / 12-2265
Filed January 9, 2014

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY MAIN,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Cheryl E. Traum, District Associate Judge.

Defendant appeals from his conviction for assault with intent to commit sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Michael J. Walton, County Attorney, and Melisa K. Zaehringer, Assistant County Attorney, for appellee.

Considered by Danilson, C.J., and Vaitheswaran and Potterfield, JJ.

DANILSON, C.J.

Anthony Main appeals from his conviction for assault with intent to commit sexual abuse, pursuant to Iowa Code section 709.11 (2011). He argues the State presented insufficient evidence to support his conviction, as the State failed to prove he had the specific intent to commit sexual abuse. Because we find there was sufficient evidence to support a finding of specific intent to commit sexual abuse, we affirm.

I. Background Facts and Proceedings.

On June 14, 2012, Main entered the computer lab section of the teen area of a public library. He sat next to a sixteen-year-old boy who was using a computer, although other computers were available at the time. Main used a computer for about fifteen minutes then stood up, walked around, and sat on the other side of the teen at a computer that was not turned on. Main never spoke to the teen. He brushed the teen's back with his hand and touched the teen's lower leg with his own leg. After sitting for some time, Main slowly reached his hand over to the teen's leg and began touching the teen's thigh two to three inches away from the teen's penis. At the same time, Main rubbed his own groin area with his other hand. The teen—who testified he was scared—did not say anything to Main because he "froze up." The teen logged off of the computer, rose, and left the area, immediately reporting to an adult what had occurred. Main appeared to briefly follow him but did not pursue the encounter before exiting the library. Main had previously frequented the teen section of the library.

On June 22, 2012, the State charged Main by trial information with assault with intent to commit sexual abuse in violation of Iowa Code section 709.11.

Main waived his right to a jury trial, and a bench trial took place on September 18, 2012.

The district court found Main guilty of assault with intent to commit sexual abuse. Main appeals, conceding sufficient evidence of an assault was presented, but arguing the State introduced insufficient evidence of his specific intent to commit sexual abuse.

II. Standard of Review.

We review challenges to the sufficiency of evidence for errors at law. *State v. Sanford,* 814 N.W.2d 611, 615 (Iowa 2012). Substantial evidence exists to support a verdict when the record reveals a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). In making this determination, we view the evidence in the light most favorable to the verdict, including all reasonable inferences that may be deduced from the record. *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004).

III. Discussion.

Main was convicted of assault with intent to commit sexual abuse under Iowa Code section 709.11, which reads, "Any person who commits an assault, as defined in section 708.1, with the intent to commit sexual abuse . . . [i]s guilty of an aggravated misdemeanor if no injury results." Our supreme court has previously interpreted this statute to mean: "(1) the defendant assaulted the alleged victim, (2) with the intent to commit a sex act, (3) by force or against the will of the victim." *State v. Beets*, 528 N.W.2d 521, 523 (Iowa 1995). Main admits the State presented substantial evidence to support the finding he

intended to commit a sexual act,[1] but argues there was insufficient evidence he intended to commit this sexual contact by force or against the will of the teen. Although the defendant need not complete a sex act to commit assault with the intent to commit sexual abuse, the State must show the defendant had the requisite intent through the completion of an overt act beyond mere preparation. *State v. Radeke,* 444 N.W.2d 476, 478 (Iowa 1989).

To determine whether the defendant had the requisite intent, our supreme court has "pointed to a sexual comment made by the defendant to the victim, touching in a sexual way, the removal or request to remove clothing, or some other act during the commission of the crime that showed a desire to engage in sexual activity." *State v. Casady,* 491 N.W.2d 782, 787 (Iowa 1992). A defendant "will generally not admit later to having the intention which the crime requires . . . his thoughts must be gathered from his words (if any) and actions in light of surrounding circumstances." *Radeke*, 444 N.W.2d at 478. The supreme court has also considered other factors relevant, including but not limited to:

> the relationship between the defendant and the victim; whether anyone else was present; the length of the contact; the purposefulness of the contact; whether there was a legitimate, nonsexual purpose for the contact; where and when the contact took place; and the conduct of the defendant and victim before and after the contact.

Pearson, 514 N.W.2d at 455. "Evidence sufficient to prove necessary specific intent includes sexual comment, touching in a sexual manner, attempt to remove

[1] Iowa Code section 702.17 defines a sex act, in relevant part, as "any sexual contact between two or more persons by: . . . contact between the finger or hand of one person and the genitalia or anus of another person." Contact that constitutes a sex act need not be skin-to-skin; it may occur though both parties are clothed. *State v. Pearson*, 514 N.W.2d 452, 456 (Iowa 1994).

clothing, or an act in any other way which would indicate a plan to engage in sexual activity." *State v. Most*, 578 N.W.2d 250, 254 (Iowa Ct. App. 1998).

Main admitted he touched the teen with the intent to initiate sexual contact. He contends, however, he only intended to engage in consensual sexual activity. A rational trier of fact could find this testimony was not credible. *See Radeke*, 444 N.W.2d at 478 ("Defendant made the following admission to the police: 'I would have had sex with her at this point if she had agreed, but I did not intend to force her to have sex with me.' While he did deny an intent to have forcible sex, a rational trier of fact could reject his explanation that he did not intend to force himself upon the agent.").

Here, Main told the police when being questioned that his sexual preference is for males between the age of fifteen and nineteen. On the date in question, he was aware he was in an area of the library designated for teenagers. He chose the computer next to the teen even though other computers were available. In fact, the computer Main chose to sit at was not operable. After sitting, Main touched the teen's back with his hand and the teen's leg with his leg. Main admitted this contact was sexually arousing to him. He then reached over and touched the teen's thigh, approximately two-to-three inches from the teen's penis. At the same time, Main rapidly rubbed his own groin area. The teen then got up and left the area. We note that the contact between Main and the teen ended only when the teen left the area.

Although Main testified he would not have taken his actions further without the teen's consent, the district court did not find his testimony credible. *See State v. Liggins*, 524 N.W.2d 181, 187 (Iowa 1994) ("[T]he court's findings on

credibility of the witnesses are entitled to considerable deference."). The evidence supports the conclusion that all touching was intentional, offensive, and without the teen's consent. Main's intent is particularly reflected by his action in rapidly rubbing his own groin area.

As stated before, we must gather the thoughts and intent of the defendant through his actions and in light of the surrounding circumstances. *See Radeke*, 444 N.W.2d at 478. Having considered evidence in the light most favorable to the verdict, we conclude there was substantial evidence to support a finding of specific intent to commit sexual abuse, and we affirm.

AFFIRMED.

Vaitheswaran, J., concurs; Potterfield, J., dissents.

POTTERFIELD, J. (dissenting)

I respectfully dissent from the majority's conclusion Main's actions and the surrounding circumstances support a finding of specific intent to commit a sex act by force or against the will of the teenager in the library. The majority opinion relies on the district court's credibility finding against Main, which is not based on any inconsistency in his statements or between his statements and the context. Like the district court, the majority relies on circumstances present in cases involving children, where the element of action by force or against the will of another is not implicated.

Our supreme court has considered the sufficiency of evidence to convict an accused of assault with intent to commit sexual abuse in several cases involving a child too young to be able to consent. *See Casady*, 491 N.W.2d at 787; *Pearson,* 514 N.W.2d at 455; *Most*, 578 N.W.2d at 254; *State v. Spargo*, 364 N.W.2d 203, 210 (Iowa 1985) (noting fourteen-year-old child could not consent to sex act under sexual abuse statute); *State v. Roby*, 188 N.W. 709, 715 (Iowa 1922) (holding carnal knowledge of a girl under the age of consent, with or without force, constitutes sufficient evidence of assault with intent to commit rape). In those cases, the crime did not require the element of specific intent to commit sexual assault by force or against the will of the victim, since the alternatives to consent in Iowa Code 709.1 subsections two and three were met. *See* Iowa Code §§ 709.1(2) (defining any sex act as sexual abuse when other party to the sex act has a mental defect or incapacity which precludes giving consent); 709.1(3) (defining any sex act as sexual abuse when other party to the sex act is a child). The teen victim here is old enough to consent; therefore

elements must include a specific intent to commit a sex act by force or without consent. *See* Iowa Code § 702.5 (defining a child as a person under the age of fourteen).

When our courts have found sufficient evidence of intent to commit sexual abuse by force or against the will of another, the facts have included planned deception, threats, or force to perpetrate the assault. In *Beets*, 528 N.W.2d at 423, a man took a member of his church to a secluded road late at night, lunged at and grabbed the woman who struggled, and attempted to make contact between their genitals. Likewise, in *Radeke*, 444 N.W.2d at 478, our supreme court found sufficient evidence of intent to commit sexual abuse by force or against the will of another where the defendant employed planned deception to lure the victim to a secluded location, used force and threats to get her to unbutton her blouse, and did not release the victim when she pulled away from him.

By contrast, the State presented evidence showing Main's behavior occurred in a location that was public and supervised: in the library with others sitting nearby and at about ten in the morning. Main's behavior was deliberately stealthy and without forceful aggression. He silently brushed the teen's leg and back, sat for a period of time before slowly reaching over his hand, and ultimately watched the teen leave but did not pursue further conduct. Although I agree with the majority that Main's touching of the teen was intentional and offensive to the teen as required to prove assault, these actions in this public setting considered in the light most favorable to the State do not generate sufficient evidence to

support a finding that his intent was to perform a sex act *by force or against the will* of the teen.

In evaluating evidence sufficient to prove an element of a crime, our supreme court has said the evidence must "raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." *State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981). The evidence surrounding this assault creates a suspicion of intent to commit sexual abuse, but it does not raise a fair inference of specific intent. I would reverse and remand for entry of judgment on the lesser-included offense of assault. *See State v. Pace*, 602 N.W.2d 764, 774 (Iowa 1999).